

STATEMENT BY

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**BEFORE THE
HOUSE COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON THE FEDERAL WORKFORCE
AND AGENCY ORGANIZATION**

REGARDING

**THE COUNTDOWN TO COMPLETION:
IMPLEMENTING THE NEW DEPARTMENT OF
HOMELAND SECURITY PERSONNEL SYSTEM**

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Mr. Chairman and Members of the Subcommittee: My name is T.J. Bonner and I am the President of the National Border Patrol Council of the American Federation of Government Employees (AFGE), AFL-CIO. On behalf of the more than 55,000 federal employees in the Department of Homeland Security represented by AFGE, I thank you for the opportunity to testify today.

Members of the Committee may be aware that AFGE has filed suit in U.S. District Court to block implementation of the “final” regulations DHS has issued regarding its new personnel system. There is no question that these rules go far beyond the authorities Congress gave the DHS Secretary to design a personnel system that would grant “flexibility” to DHS management to meet unique domestic security contingencies that the agency might face. Indeed, there is nothing in the new personnel system explicitly linked to domestic security concerns. On the contrary, the expansion in management power and corresponding reduction in employee rights and protections are put forth in the context of management jargon completely removed and apart from domestic security triggers.

It would be a grave mistake to view the new Department of Homeland Security human resources system regulations simply as an arcane set of rules governing such mundane issues as pay rates and collective bargaining rights for employees. To do so greatly diminishes the import of these changes on the readiness of the Nation to prevent another terrorist attack. Unlike most other Federal agencies, the core mission of the Department of Homeland Security is the safety of

the American public, and any fundamental changes to its personnel regulations must be viewed through that prism.

Without a doubt, dedicated and experienced personnel are America's most invaluable resource in the war on terror. No technology can replace their perseverance, expertise, and ingenuity. Keeping these employees motivated to remain in the service of our country is not simply a matter of fairness to them, but is also absolutely essential to the protection of our Nation against the threat of terrorism. To the extent that the new Department of Homeland Security human resources system fails to achieve that goal, it must be modified in the interest of homeland security.

The proponents of the new personnel regulations argue that they are necessary in order to provide the flexibility and speed necessary to respond to immediate and long-term terrorist threats. At no time during the debate on the Homeland Security Act or since has anyone been able to point to a single concrete example of where collective bargaining or employee rights in any way hampered the Government's ability to immediately respond to any potential threat. In fact, they have actually made significant contributions to the efficiency of our Government and the safety of our Nation:

- In the aftermath of the September 11, 2001 terrorist attacks, I&NS managers engaged in a campaign of deception to lull the public and Congress into a false sense of well-being about the security of our northern border. Two

courageous front-line Border Patrol agents from Detroit, Michigan, Mark Hall and Robert Lindemann, spoke out and provided a truthful assessment of our vulnerabilities. As a direct result of these disclosures, Congress authorized and funded a tripling of the number of Border Patrol agents, Immigration Inspectors, and Customs personnel along the northern border. The I&NS attempted to fire these two employees, and it took the intervention of their union and the Congress to stop this retaliatory action.

- In 2003, the Bureau of Customs and Border Protection implemented a program to train all employees in the detection of terrorist weapons by distributing a computer disk to all employees. The union expressed concerns about the inadequacy of that approach, and proposed a more comprehensive curriculum utilizing classroom instruction. After private and public urging, the Bureau eventually adopted the union's suggestion.
- In 1998, the Border Patrol proposed that all of its agents wear body armor at all times while on duty. Through collective bargaining, the union was able to convince management that such a policy would have resulted in numerous agents falling prey to heat stroke in the harsh desert climate of the southwestern United States, and jointly developed a much more sensible policy.
- In 1997, the I&NS unilaterally implemented a policy that prohibited its law enforcement employees from asking any detainee to remove any article of clothing, including hats and coats, unless they had supervisory approval and filled out cumbersome reports to justify the action. This policy totally compromised public and officer safety, as Border Patrol agents routinely encounter large groups of illegal aliens wearing multiple layers of clothing that render pat-down searches completely unreliable in the discovery of hidden weapons. The union filed an unfair labor practice charge and forced management to rescind the policy until the parties bargained over a more reasonable replacement.
- In 1993, five Border Patrol agents in San Diego, California were wrongfully accused of violating the civil rights of an illegal alien. The Border Patrol proposed terminating the employment of all five employees. An impartial

arbitrator ruled that the agents were not guilty of the alleged misconduct and that the agency failed to conduct a full and proper investigation. All five employees were ordered reinstated.

Distressingly, the outcome of all the aforementioned examples would have been the exact opposite under the provisions of the new human resources system.

The Union Proposals DHS Ignored

None of this was necessary or inevitable. The unions representing DHS employees have not questioned the fact that the unique homeland security responsibilities of the agency would from time to time require management to act unilaterally, without regard to the provisions of a collective bargaining agreement. We put forth detailed proposals that gave management extraordinary flexibility to achieve its stated goal of being able to act unilaterally when security considerations justified it.

Our proposal was as follows: Whenever management determined that it had a need to act quickly to protect homeland security, it could do so. If any “pre-implementation procedure” or “appropriate arrangement bargaining” or even the application of the provisions of an existing collective bargaining might impede the ability to act, these impediments could be ignored for up to ten days. The agency, a component, or even a single bureau would have, at its sole discretion, the right to deploy, reassign, or transfer employees for up to ten days without either bargaining

or observing the provisions of a collective bargaining agreement.

The unions only asked that these management determinations be “good faith” exercises of judgement. We did not ask to be able to come back afterward and question the judgements’ validity. We asked only that the assignments be based upon reasonable assessments of factors known at the time, including reasonable determinations that any pre-implementation bargaining or the application of a collective bargaining agreement, would somehow adversely affect the accomplishment of the action.

Only after implementation of the unilateral action, that is, only after 10 days had elapsed following the assignments would management be asked to come back and talk to the union about arrangements for workers who might have been adversely affected by the assignment (for example, if an employee were deployed at the last minute and incurred parking expenses at the airport, arrangements would be made after-the-fact for reimbursement). Our proposal was that this “post-implementation” bargaining should occur as soon as was practical, with plenty of leeway for management to decide when it could occur.

The goal of the post-implementation bargaining was not to prevent similar unilateral decisions in the future or to constrain management’s prerogatives regarding its judgements of when a homeland security situation justified the exercise of discretion. DHS clearly understood this. Indeed, the only goal was to make sure

that employees who incurred reasonable out-of-pocket expenses or other harm as a result of the deployment, reassignment, or transfer would be reimbursed or recognized in some way.

Incredibly, this proposal was ignored in its entirety. In essence, the regulations say that even though Congress granted DHS the authority to act unilaterally because of the unique exigencies of protecting the homeland, the Department intends to act unilaterally at all times, the Department will at all times refuse to engage in collective bargaining on routine workplace issues, and the Department will permanently void any provisions of collective bargaining agreements at will. AFGE knows that this was not the intent of Congress when it granted DHS the authority to “modernize” its personnel system. After all, there is nothing at all modern or new about management by fiat, management refusal to bargain, or management by fear and intimidation, and if Congress had intended to have such a system imposed upon DHS, it would have written the law in that fashion.

The New DHS Regulations

The regulations that set forth the new DHS personnel system strip the agency’s employees of longstanding statutory rights involving the scope of collective bargaining. In place of those rights, the DHS regulations impose a regime of unilateral management decree over almost every meaningful condition of

employment. No longer will DHS employees who have elected union representation and have enjoyed a voice in decisions affecting their work lives be able to negotiate over even the impact or implementation of most of management's unilateral changes in conditions of employment. What this means in practice is that under the new regulations, neither DHS management nor the union representing DHS workers will be permitted to bargain over the procedures to be followed when management makes changes in key conditions of employment, including the assignment or location of work. This is true even if both management and the union agree that a negotiated agreement would improve or ease the impact and implementation of the new rules. For example, if DHS decided it needed to transfer an agent from Florida to Montana and it had several qualified volunteers, the agency could still decide to send a single head of household, or someone with a chronic illness or condition that cannot be treated in Montana.

In addition, under the new regulations, top agency management is authorized, without limitation, to issue agency-wide directives to prohibit collective bargaining on the few matters that remain negotiable. They have also given themselves the right to invalidate provisions of existing collective bargaining agreements. To further undermine the integrity of collective bargaining, the regulations establish an internal DHS board appointed solely by the Secretary with the authority to adjudicate any and all claims by employees and unions that management has violated the meager bargaining obligations that the new regulations permit to continue. Another extremely problematic aspect of the DHS

regulations has to do with the agency's attempt to dictate to the Federal Labor Relations Authority (FLRA) and the Merit Systems Protection Board (MSPB) which DHS labor relations and employee disputes they will address and exactly how they should address them.

In essence, the regulations tell both the FLRA and the MSPB to rubber-stamp decisions of the internal DHS "kangaroo court" (the Homeland Security Labor Relations Board). Indeed, MSPB is instructed to uphold the internal board's decisions on penalties even if they are unreasonable and disproportionate to the alleged offense; the only time the MSPB would be permitted to alter a penalty is if the employee were able to show that it is "wholly without justification" – a high legal standard no one is likely to ever meet. In particular, these new regulations will, for all practical purposes, render the "Douglas Factors" null and void. The Douglas Factors, first enunciated by the MSPB in 1981, are:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2. the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. the employee's past disciplinary record;

4. the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability:

5. the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

6. consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7. consistency of the penalty with the applicable agency table of penalties; (The Board mused in footnotes that these tables are not to be applied mechanically so that other factors are ignored. A penalty may be excessive in a particular case even if within the range permitted by statute or regulation. A penalty grossly exceeding that provided by an agency's standard table of penalties may for that reason alone be arbitrary and capricious, even though a table provides only suggested guidelines.)

8. the notoriety of the offense or its impact upon the reputation of the agency;

9. the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

10. potential for employee's rehabilitation:

11. mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

12. the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The DHS regulations also curtail the MSPB's jurisdiction by shortening the time a DHS employee has to file appeals, limiting his discovery, and providing for summary adjudication of an employee challenge to adverse actions. These limitations effectively deprive DHS employees of their day in court, a right which all other federal employees enjoy as provided in the MSPB's own regulations.

What follow are some of the most egregious examples of the ways the new DHS rules violate Congress' intent that the new DHS system "ensure that employees may exercise the right to organize, bargain collectively, and participate through their exclusive bargaining representatives in decisions which affect them subject to any exclusion from coverage or limitation on negotiability established by law." 5 U.S.C. § 9701 (b) (4).

Negotiation Over Department-Wide Regulations

Under current law and regulation, a federal agency has a duty to bargain over otherwise negotiable changes in conditions of employment that are promulgated through department-wide regulations. Only by demonstrating a "compelling need" can an agency legitimately evade its duty to bargain. Over the years, the FLRA has set a high standard for finding that a compelling need does indeed exist. As a result, there are very few cases in which agencies have been able to avoid bargaining over a change in conditions of employment solely because it was issued department-wide. Under the DHS regulations, however, DHS will not be required to

show any reason, let alone a compelling need, to avoid dealing with the exclusive representatives of its employees concerning department-wide changes in conditions of employment. DHS has told us this would be true even if a regulation were not department-wide, but merely covered more than one component, such as Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE).

There is a range of matters that employees, through their unions, negotiate to ensure fair and equitable treatment, protection from favoritism or reprisal, mitigation of adverse impact, etc. Under the proposed regulations, DHS can avoid dealing with its employees' concerns by issuing the changes department-wide. These could include such items as alternative work schedules, methods for choosing who will work overtime or be sent on a detail, issues regarding uniforms or dress codes, health and safety, travel arrangements, and many other matters. Unions play a valuable role in helping to develop the details and protections that make these changes work better for the agency and the employees. DHS has apparently decided that "modern" management means eliminating these types of negotiations that have proven mutually beneficial in the past.

Negotiating Procedures and Appropriate Arrangements

Federal agency managers have always had a wide range of changes they can make in the workplace without union consent. These include the agency budget, the organizational structure, the assignment of work, the direction of employees,

internal security, and other issues. Under current law, if unions make a request to bargain, agencies must negotiate over items such as the procedures that will be used and appropriate arrangements for employees who are adversely affected by the management action. This is an important safeguard that promotes workplace harmony and efficiency, and restrains abusive workplace practices.

For example, an agency may decide to deploy workers from their usual duty station to another location. The new location may be in the same general commuting area or hundreds of miles away. It may be for a day or for weeks or months. Under current rules, the agency is free to select only from those employees who have the knowledge, skills and abilities it determines are necessary to do the job. But the employees and their union have an important interest in ensuring that the procedures used are fair and respect the personal and family responsibilities of the workforce.

It is common for negotiated agreements to include procedures for setting up rosters or other processes that help to fairly distribute the assignments among qualified employees. This helps prevent managers from giving coveted assignments to their cronies and denying opportunities to other workers who may be even more proficient. It also helps prevent managers from giving unpopular assignments as reprisals or because of their animosity toward the race, gender, religion, or political party of the employee. Unions and managers also frequently negotiate procedures that call for as much notice as possible before employees have their regular duty

station changed so that they and their families can prepare for the change. If the assignment will require the employee to travel and be away from his or her family for some time, there are other important procedures and arrangements that unions and managers commonly negotiate. These include such things as travel procedures that keep employees from having to go into their own pockets for work-related expenses and arrangements that allow them to call home regularly and travel home for visits during long assignments. If the assignment is closer to home, but not at the employee's regular duty station, these negotiated matters could include such things as covering extra commuting fees if an employee is detailed to a location where parking costs more than the regular duty station or where the employee has to use a different mode of transportation than is available at the regular duty station. These are just reasonable and rational workplace transactions that current law requires of federal managers and federal union representatives to keep their agencies running smoothly.

Before fair shift and overtime rotations were negotiated, for example, employee morale suffered and numerous grievances were constantly being filed. Negotiating these matters has led to higher morale, stability, and almost no litigation. But DHS apparently has forgotten history and wants to turn back the clock. Its final rules preclude bargaining over procedures for most changes and greatly reduce the obligation to bargain over appropriate arrangements for employees who are adversely affected by a management action (for example, DHS will not have to bargain over harm done to its employees unless it was as the result of a

management action that lasted 60 or more days). This is true even if a hardship exists for a particular employee and qualified volunteers are willing to be deployed. Under DHS' new scheme, lacking union involvement, single heads of households or women with pregnancy complications or employees with serious illnesses could be deployed for periods of up to 59 days despite willing and qualified volunteers being available. Under current law, the union can protect employees from hardship and safety concerns. DHS has chosen to severely limit its use of a vital mechanism to help make effective workplace changes that respect the needs of its workers, even though the federal unions agreed to a radical change from past practice that would have allowed DHS, in any and all cases, to act first and negotiate later in situations that could not wait for even expedited negotiations.

Bargaining Limited to Changes that Have a “Foreseeable, Substantial, and Significant Impact” Affecting Multiple Employees in the Bargaining Unit

In addition to limiting bargaining over changes in conditions of employment and restricting bargaining over procedures and appropriate arrangements, the final regulations remove management's duty to bargain over *any* proposal unless it would have a “foreseeable, substantial, and significant impact” on multiple employees in the bargaining unit. The phrase, “foreseeable, substantial, and significant impact” is not defined and is certain to lead to disputes and litigation. Will each management official be able to decide for him or herself what has a foreseeable, substantial, and

significant impact on the employees?

There are many ideas and concerns that bargaining unit employees will want to share that might not be either momentous or urgent, but that, nevertheless, could make a management initiative work better and enhance, rather than harm, productivity and workplace harmony. But DHS regulations prohibit interaction of this nature with employees. The treatment of issues that may affect a single worker is also problematic under the DHS regulations. Why should “foreseeable, substantial, and significant” harm to one employee in a workplace be labeled either unimportant or justifiable? This exclusion from bargaining is a license to pick on, harass, discriminate, and take reprisals against individual employees. Further, as an organization that not only must recruit members on an individual-by-individual basis but that also has a legal duty to represent each individual in a bargaining unit, our union finds the “individuals don’t count” approach unfair and confusing. Finally, it is clear that although actions with indisputably foreseeable, substantial and significant harm cannot be imposed on groups in one fell swoop without negotiation, management will be able to accomplish the same goal by taking the same action separately against individual after individual, and in spite of our legal – and moral – responsibility to represent each member of our bargaining unit, we will be prevented from doing so. The principle that is at the heart of unionism – “an injury to one is an injury to all,” is a principle that the DHS regulations forbid our union to uphold in the context of collective bargaining. At the current historical moment, when American have let it be known that safeguarding domestic security is one of their highest

priorities, we cannot understand why DHS policy should be to undermine the federal employees charged with that vital task by removing their voice in the workplace. Why tell them, in effect, to shut up and follow instructions from above? And if DHS makes a change that it unilaterally believes will have a less than substantial or significant effect on them, they don't deserve to be able to speak up about their own interests in the workplace.

Loss of Managers' Right to Bargain Formerly Permissive Subjects

The Civil Service Reform Act of 1978 codified the federal labor relations procedures, and divided issues into three major categories. The categories described issues from the perspective of how agency managers should proceed in the context of collective bargaining when federal employees had elected union representation. The categories were: a) issues over which managers were forbidden to bargain, b) issues over which managers were permitted, but not required, to bargain, and c) issues over which managers were required to bargain. The new regulations eliminate the flexibility of DHS managers to bargain over "permissible, but not required" subjects of bargaining. These issues include the numbers, types and grades of employees performing a specific job, and the methods, means and technology used to accomplish the task. Not only has DHS told its frontline employees that they don't matter, but its new regulations tell its managers that they and their judgment don't matter either. No longer will managers at a border facility or DHS office be able to decide for themselves that it is in the interest of their

Directorate or the Department to work out and customize some of these details of getting the job done at their facility with their workers and their union. The new regulations forbid them from doing so. The Homeland Security Act required flexible and contemporary new systems. DHS' action here is just the opposite.

Loss of Neutral, External Board for Bargaining Disputes

Under current law, negotiability disputes, unfair labor practice charges and bargaining impasses are heard and decided by independent boards and authorities whose charge is to be neutral, and which are external to the agencies and unions involved. DHS' regulations allow the agency to exempt itself from these standards. Instead of being held accountable by an external, independent, and neutral body, DHS will set up its own Homeland Security Labor Relations Board (HSLRB), which will be internal to the Department and made up of members selected solely and unilaterally by the Secretary. The HSLRB will replace the FLRA in deciding negotiability disputes and unfair labor practice charges and the Federal Services Impasses Panel (FSIP) in resolving bargaining impasses. The requirement to go to a "Company Board" instead of a neutral body makes a mockery of Congress' intent.

Pay and Performance Management

Under the new regulations, DHS employees will lose their current market-

based pay system that affords fairness, objectivity, predictability, credibility, and most importantly, Congressional oversight. Base pay and pay adjustments now are determined by the Executive and Legislative branches of government, which offers employees checks and balances. Under these new DHS regulations, the Executive Branch alone will determine pay.

DHS lists a number of factors that should guide pay increases such as recruitment and retention needs, budgets, performance, local labor market conditions, and even the availability of Department funds. Read together, DHS can choose from among any of these factors to justify whatever it does. DHS can, and likely will, use these factors variously to justify inconsistent decisions by region or occupation, and, of course, by individual. For example, DHS may deny a pay raise in San Diego, despite high performance, a tight labor market, and adequate budget authority by citing stable recruitment. At the same time, it could lavish high salary adjustments on those working in Brownsville, Texas despite lower performance and retention difficulties. And no one will be able to challenge the decision. Will politics affect these allocation decisions? Will favoritism and animus affect these allocation decisions? There is every reason to believe that such unbridled discretion will lead to chaos, inconsistency, and a huge morale problem. It also promises to lead to enormous increases in EEO filings and other litigation, since other avenues to voice dissent or bring forth evidence of wrongdoing have been eliminated. Employees will have no faith or respect for a system that exposes them to random variations in pay, and subjects them to the whims of supervisors or higher-ranking political appointees.

Since DHS has made it impossible for an employee's union to address problems through collective bargaining, litigation and complaining to members of Congress will be the order of the day. Finally, it is inescapable that for pay-for-performance to have any opportunity to have any positive impact on DHS, it must be adequately funded. A zero-sum reallocation of salaries and salary adjustments will guarantee failure. The President's budget gave no indication that the Administration intends to provide the necessary level of funding to avoid a ruinous competition within DHS where anyone's gain will be someone else's loss. I urge the Congress to recognize how crucial adequate funding is to any hope of success for the DHS pay scheme.

Conclusion

In conclusion, AFGE strongly urges the Committee to pass legislation to:

- Restore the scope of collective bargaining to its current state. The new restrictions are wholly unjustified, and will jeopardize public safety by allowing unsound decisions to be implemented without checks and balances.
- Ensure that the new pay system keeps DHS employees at least on par with the rest of the Federal workforce. Otherwise, the Department will be unable to attract and keep employees in its critical occupations.
- Restore mitigation power to neutral adjudicators. Without this important check and balance mechanism, managers will be encouraged to act arbitrarily and capriciously, discouraging dedicated from people serving in the Department.

- Eliminate Mandatory Removal Offenses from the disciplinary system. This concept has failed miserably in every agency where it has been utilized, and there is no reason to believe that DHS will be any different.
- Eliminate the internal Labor Relations Board or revise it so that it truly has credibility with employees and their representatives.

It is not too late to change the human resources system now. Once it is implemented and experienced employees start heading for the exit doors, however, it will be impossible to replace their expertise. Even if the necessary corrections are made at that point, it would take years to regain the lost levels of experience. The employees of the Department of Homeland Security will not engage in public demonstrations. Quietly, one by one, they will leave to pursue careers in other agencies that will treat them with the dignity and fairness that they deserve. The real losers in this ill-advised experiment will be the citizens of this country who are looking to their Government for protection. The Department of Homeland Security has already let them down by issuing personnel regulations that will chase away the best and the brightest employees. It is now up to Congress to step up and force the Department to modify the regulations to conform to the spirit of the Homeland Security Act calling for a modern personnel system that treats employees fairly and values their expertise.

This concludes my statement. I would be happy to answer any questions the Members of the Subcommittee may have.